No. 78-984

In the Supreme Court of the United States

OCTOBER TERM, 1978

BENJAMIN CARR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-984

BENJAMIN CARR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in permitting the government to impeach a defense witness by eliciting that he had remained silent about certain evidence prior to trial.

1. Following a jury trial in the United States District Court for the District of Connecticut, petitioner, a previously convicted felon, was convicted of receiving firearms that had been shipped in interstate commerce, in violation of 18 U.S.C. 922(h)(1). He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a-13a).

As summarized in the opinion of the court of appeals (Pet. App. 2a-4a), the evidence showed that on August 17, 1976, petitioner redeemed four shotguns and two rifles that he had previously pawned at the Chapel Loan Company in New Haven, Connecticut. Shortly thereafter,

the police were notified that three men and a woman had been seen leaving a building on Chapel Street with an armful of rifles and that they had put the rifles into the trunk of an automobile bearing Connecticut license number HE 1229. A police officer spotted the automobile and arrested petitioner and his son, who were wanted in connection with a shooting that had occurred the night before. After a search of the trunk of the car revealed four shotguns and two rifles, the other occupants of the car, including petitioner's nephew, James Aiken, were arrested.

At the time of his arrest, petitioner volunteered to the police that the weapons belonged to him. After petitioner received *Miranda* warnings, he stated once again that he was the owner of the guns and that he had just picked them up at the pawn shop. At his request, petitioner was then taken to the pawn shop, where his admissions were confirmed by the clerk. Later, petitioner told a detective that the guns were his, and he repeated to another police officer that he had picked up the guns at the pawn shop prior to his arrest (Pet. App. 3a).

At trial, petitioner denied these admissions, contending that his son and nephew had taken the guns from the pawn shop. Petitioner's son and nephew corroborated this story. The prosecutor then cross-examined Aiken about his failure, during the 19-month period that followed his arrest, to disclose that he and petitioner's son, rather than petitioner, had picked up the guns (Pet. App. 10a).

2. Petitioner argues (Pet. 15-19) that the prosecutor's reference to Aiken's pretrial silence violated the rule of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). That claim is insubstantial for the reasons stated by the court of appeals (Pet. App. 10a-12a), on which we rely. *Doyle* holds that impeachment of a *defendant* by reference to his silence after receiving *Miranda* warnings is improper, because *Miranda* warnings contain an implicit assurance that the arrestee's silence will not be used against him. 426 U.S. at

618-619. Here, however, the prosecutor inquired into Aiken's, not petitioner's, silence and therefore could not have infringed petitioner's Fifth Amendment rights. See *Couch* v. *United States*, 409 U.S. 322, 328 (1973); *Namet* v. *United States*, 373 U.S. 179, 185 (1963).[1] Petitioner, of course, did not remain silent after receiving *Miranda* warnings. In addition to volunteering statements at the time of his arrest, he testified extensively during trial.

Nor is there merit to petitioner's argument that the government's cross examination of Aiken conflicted with *United States* v. *Hale*, 422 U.S. 171 (1975). *Hale*, like *Doyle*, considered the evidentiary use of a *defendant's* post-arrest silence. The Court noted that the giving of *Miranda* warnings, together with the "inherent pressures of in-custody interrogation," frequently stripped a defendant's silence of probative value. 422 U.S. at 177, 180. Those factors are not present here. Aiken was not questioned about his silence during post-arrest, custodial interrogation. He was questioned about his continuing failure to disclose crucial information helpful to petitioner over a 19-month period, 13 months of which were after the charges against Aiken had been dismissed. In these circumstances, the court of appeals correctly concluded

---

[1]Hence, the decision in *Doyle* does not apply to this state of facts. See 426 U.S. at 616 n.6. See also *id.* at 627 (Stevens, J., dissenting) ("a defendant may not object to the violation of another person's privilege").

that Aiken's silence was relevant to his credibility and was a proper subject for cross-examination (Pet. App. 11a). See, generally IIIA J. Wigmore, *Evidence* §1042 (1970 ed.).[2]

In any event, as the court of appeals held (Pet. App. 12a), even if the prosecutor's reference to Aiken's pre-trial silence was improper, it was harmless under all the circumstances. See *Namet* v. *United States, supra,* 373 U.S. at 189; *United States* v. *Glasser, supra,* 443 F. 2d at 1005-1006. Aiken's testimony was merely cumulative of the testimony presented by both petitioner and his son. In light of the "overwhelming evidence of [petitioner's] guilt" (Pet. App. 2a), the government's impeachment of Aiken did not affect the jury's verdict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

---

[2]The cases relied upon by petitioner (*United States* v. *Rubin,* 559 F. 2d 975 (5th Cir. 1977), vacated and remanded, No. 77-792 (Oct. 2, 1978); *United States* v. *Williams,* 464 F. 2d 927 (8th Cir. 1972); *United States* v. *Glasser,* 443 F. 2d 994 (2d Cir.), cert. denied, 404 U.S. 854 (1971); and *United States* v. *Tomaiolo,* 249 F. 2d 683 (2d Cir. 1957)) are not relevant here. In each of those cases the prosecutor cross-examined a defense witness about invocation of his Fifth Amendment privilege before the grand jury. In this case, as the court of appeals recognized, Aiken "was never questioned about invoking [the Fifth Amendment privilege]" (Pet. App. 10a). Moreover, while the assertion of the Fifth Amendment privilege by a grand jury witness may have little probative value, the situation here is quite different. As the court below observed (*id.* at 11a-12a), petitioner could have questioned Aiken about the reasons why he did not volunteer his version of the facts prior to trial.